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SENATE

REPORT
No. 97-528

COAL DISTRIBUTION AND UTILIZATION ACT OF 1982

AUGUST 17, 1982.—Ordered to be printed

Mr. MCCLURE, from the Committee on Energy and Natural Resources, submitted the following

REPORT

together with

ADDITIONAL AND MINORITY VIEWS

[To accompany S. 1844]

The Committee on Energy and Natural Resources, to which was referred the bill (S. 1844) to facilitate the national distribution and utilization of coal, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill (as amended) do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert the following:

That this Act may be cited as the "Coal Distribution and Utilization Act of 1982".

FINDINGS AND PURPOSE

SEC. 2. (a) The Congress hereby finds and declares that—

(1) the continuing dependence of the United States on foreign sources for petroleum and petroleum products entails grave national security risks, results in major balance-of-payment deficits, and increases in inflation and unemployment in the domestic economy;

(2) the United States possesses extensive coal reserves that must be produced, distributed, and utilized to reduce the Nation's dependence on imported petroleum;

(3) domestic coal reserves cannot be developed and used for fuel unless adequate transportation systems and facilities exist for the efficient and economic distribption of large quantities of coal to markets in interstate and foreign commerce at competitive prices across great distances;

(4) the Nation's coal distribution system must include interstate coal pipeline distribution systems that will assist the Nation to develop efficiently and use its coal resources;

(5) the construction of interstate coal pipeline distribution systems to distribute domestic coal will be facilitated by granting the power of eminent domain to certain interstate coal pipeline distribution systems;

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(6) the construction of interstate coal pipeline distribution systems is a beneficial public use that justifies granting the Federal power of eminent domain to those systems for which a findings of national interest has been made pursuant to this Act;

(7) State water law and interstate compacts are carefully balanced and structured systems for the allocation of water;

(8) the national interest is best served by developing interstate coal pipeline distribution systems only in the context of those State laws and interstate compacts, notwithstanding the potential burden on interstate commerce; and

(9) the need for a national coal distribution system is subservient to the national interest in the primacy of State water law and interstate compacts on the allocation of water.

(b) The purpose of this Act is to facilitate the development of interstate coal pipeline distribution systems by granting the Federal power of eminent domain to those interstate coal pipeline distribution systems that are determined to be in the national interest: *Provided*, That such development is consistent with State water law and interstate compacts, as provided herein.

DEFINITIONS

SEC. 3. For purposes of this Act the term—

(1) "coal" means any of the recognized classifications of coal, including anthracite, bituminous, semibituminous, subbituminous, and lignite;

(2) "interstate coal pipeline distribution system" means any pipeline system the primary economic purpose of which is the distribution of coal in a liquid or solid state, but in no event may the primary purpose be the distribution of water, whether alone or mixed with other substances—

(A) from one or more points outside a State to one or more points within a State or between two or more points within a State through another State, or

(B) from one or more points within Alaska to one or more points in a foreign country. Such a pipeline system shall be deemed to be in interstate or foreign commerce if coal that enters the pipeline system is delivered for commercial use in a State other than Alaska in which the coal was placed in the pipeline, in a Territory of the United States, or in a foreign country.

An interstate coal pipeline distribution system includes line pipe, the right-of-way, valves, pumping stations, water supply pipelines, and such dewatering facilities as are necessary to delivery operations. Such systems shall not include rail, port, highway, or other ancillary coal-gathering or coal-storage facilities. Access to water for the operation and maintenance of the pipeline shall be governed by State laws and procedures except where application of such State laws and procedures would prohibit such access;

(3) "private lands" means any interest in any land other than interests—

(A) owned by the United States or agency thereof or owned by any State or any political subdivision thereof;

(B) held in trust by the United States for an Indian or Indian tribe or owned by an Indian or Indian tribe subject to a restraint against alienation imposed by the United States; or

(C) owned by a regional or village corporation established under the Alaska Native Claims Settlement Act, as amended, if such land was transferred to such corporation pursuant to said Act;

(4) "right-of-way" means such interest in land as may be necessary for construction, operation, and maintenance of an interstate coal pipeline distribution system;

(5) "Secretary" means the Secretary of Energy or his successor; and

(6) "State" means a State of the United States and the District of Columbia.

EMINENT DOMAIN AUTHORITY

SEC. 4.(a) AUTHORITY TO MAKE NATIONAL INTEREST DETERMINATION.—(1) Upon application of any person proposing to construct an interstate coal pipeline distribution system, who has filed and secured approval of a water permit or acquired other appropriate atuhorization for reservation, appropriation, use, or diversion of water under applicable State law as provided in section 5, the

Secretary shall determine whether the construction of such system shall be in the national interest.

(2) The determination of the Secretary under paragraph (1) as to whether a proposed interstate coal pipeline distribution system is in the national interest shall be based on the record as a whole, taking into consideration each of the criteria set forth in subsection (b).

(b) FINDINGS.—In making a determination under subsection (a) with respect to any proposed interstate coal pipeline distribution system, the Secretary shall make findings concerning the existent to which the system—

(1) would help meet national needs for coal distribution and utilization considering, among other matters, alternate routes, or means of distributing coal;

(2) would enhance competition and provide new market outlets and opportunities for coal producers, including small and independent producers;

(3) would contribute to the national security by encouraging the displacement of imported petroleum, petroleum products, and coal with domestic coal;

(4) would result in economic benefits including—

(A) reduction in coal transportation costs;

(B) reduction in wholesale and retail electric rates; and

(C) enhance reliability of supplies of both coal and electric energy; and

(5) would affect the environment, compared to the environmental impacts of alternatives, including—

(A) railroad transportation;

(B) alternate pipeline routes; and

(C) coal utilization facilities, including electric generating plants at coal mine sites and coal gasification plants.

(c) STATE CONSULTATION.—Prior to making the findings in subsection (b) regarding a proposed interstate coal pipeline distribution system, the Secretary shall provide an opportunity for written comment from any State in which a proposed interstate coal pipeline distribution system would be located or which would otherwise be affected by a proposed interstate coal pipeline distribution system.

(d) ANTITRUST REVIEW.—(1) Not later than ten days after any application for a determination under this section is filed with the Secretary, the Secretary shall notify the Attorney General of the filing of such application and shall provide the Attorney General with a copy of such application and such other information as the Attorney General may request. The Attorney General shall conduct an antitrust review to determine the likely effects upon competition of approval of such application and, not later than one hundred and twenty days after the date of receipt of such notification shall advise the Secretary of the results of such review, including, but not limited to, findings, and recommendations concerning such terms and conditions as the Attorney General deems necessary to protect and promote competition. No application may be determined to be in the national interest under this section if the Attorney General advises the Secretary in writing that, on the basis of such review, approval of such application is not consistent with the antitrust laws.

(2) For the purpose of paragraph (1), the term—

(A) "antitrust laws" has the meaning such term has under the first section of the Clayton Act (15 U.S.C. 12); and

(B) "antitrust review" has the meaning the term "antitrust investigation" has under section 2 of the Antitrust Civil Process Act (15 U.S.C. 1311).

(e) EMINENT DOMAIN AUTHORITY.—(1) Any person proposing to build an interstate coal pipeline distribution system, the construction of which has been determined by the Secretary to be in the national interest, may acquire rights-of-way over, under, upon, or through private lands by exercise of the power of eminent domain in the United States district court for the district in which such lands are located or in the appropriate court of the State in which such lands are located. In any action or proceeding to acquire rights-of-way under this section, such action or proceeding shall conform to the laws, practices, and procedures relating to the general eminent domain law of the State where the property is situated, except that in the case of any such State law, practice, or procedure, the effect of which would prohibit any acquisition under this section, such State law, practice, or procedure shall not be applicable.

(2) Nothing in this section shall be construed to permit any person to acquire any right to take, use, dispose of, or develop water through exercise of the power of eminent domain granted under this Act.

(3) No project constructed pursuant to the authorities of this section shall be considered to be a Federal project for purposes of the application for or assignment of water rights.

(4) No right-of-way may be acquired through exercise of the power of eminent domain under this section if such right-of-way is over, under, upon, or through—

(A) any land which is part of an historic site of National, State, or local significance as determined by the Federal, State, or local officials having jurisdiction thereof; or

(B) any land designated as wilderness or wildlife refuge in accordance with applicable law by the duly constituted authority; unless there is no feasible and prudent alternative to the acquisition of such right-of-way and reasonable planning is made to minimize harm to such site resulting from the acquisition.

(f) ALTERNATIVE ROUTES.—(1) Nothing in this section shall be deemed to prohibit the applicant from amending his application to request a right-of-way over any alternate route.

(2) The Secretary may require the relocation of any right-of-way sought pursuant to this Act upon a showing that—

(A) such relocation is necessary to enable the United States to fully realize the value of its mineral interest;

(B) such alternate route is available; and

(C) such relocation would not result in unreasonable expense.

(g) PAYMENT FOR FEDERAL COAL.—(1) Each application filed pursuant to subsection (a) shall list each instance where the proposed right-of-way crosses lands containing coal wherein the United States maintains a mineral interest regarding such coal (hereinafter referred to as "Federal coal"). Not later than ten days after any application for a determination under this section is filed with the Secretary, the Secretary shall notify the Secretary of the Interior of the filing of such application and shall provide the Secretary of the Interior with a copy of such application and such other information as the Secretary of the Interior may request.

(2)(A) The Secretary of the Interior shall evaluate the effects of approval of such application upon the ability of the United States to realize the value of such mineral interest as a result of approval of the application.

(B) The Secretary of the Interior shall determine—

(i) terms and conditions necessary to minimize the impact of such right-of-way on the establishment of logical mining units; and

(ii) the extent to which alternate routes are available which would minimize the impact of granting the right-of-way on the ability of the Federal Government to realize the value of Federal coal.

(C) The Secretary of the Interior shall establish the fair market value of the Federal coal precluded from being recovered as a result of the proposed right-of-way. The Secretary of the Interior shall also establish the amount of reduction of the fair market value of Federal coal which will be more costly to recover as a result of the proposed right-of-way.

(3) The Secretary of Energy shall thereafter establish such terms and conditions requiring the applicant to pay the United States the amount established by the Secretary of the Interior pursuant to subparagraph (C).

(h) RULES AND REGULATIONS.—The Secretary shall promulgate such rules and regulations as are necessary for the expeditious exercise of the authority granted in this section.

(i) ADDITIONAL REQUIREMENT.—In implementing this section, the Secretary shall be subject to the provisions of section 210 of Public Law 90–537, as amended (43 U.S.C. 1511).

PRIMACY OF STATE WATER LAW

SEC. 5. (a) The United States or its agents, permittees, licensees, or transferees or any interstate coal pipeline distribution system shall not reserve, appropriate, purchase, transfer, use, divert, dedicate, or claim water within any State for an interstate coal pipeline distribution system, unless such reservation, appropriation, purchase, transfer, use, diversion, dedication, or claim takes place pursuant to and in compliance with substantive and procedural law of that

State relating to the control, appropriation, use, disposal, or distribution of water and the protection and enforcement of water rights.

(b) Pursuant to the commerce clause in article I, section 8, of the United States Constitution, the Congress declares that the establishment and exercise of terms or conditions, including terms or conditions, on permits or authorizations for the reservation, appropriation, use, or diversion of water for any interstate coal pipeline distribution system shall be determined pursuant to the law of the State granting such permit or authorization.

(c) Nothing in this Act shall—

(1) affect in any way the validity of or preempt any provision of State law, regulation, or rule of law or of any interstate compact governing the appropriation, purchase, transfer, use, or diversion of water;

(2) preempt or modify any State or Federal law or interstate compact dealing with water quality or disposal;

(3) confer upon any non-Federal entity the ability to exercise any Federal right to the waters of any stream or to any ground water resources; or

(4) affect water rights of any Indian or Indian tribe which were established by the setting aside of a reservation by treaty, executive order, agreement or Act of the Congress.

(d) No waters to which the Federal right can be asserted shall be used in any interstate coal pipeline distribution system, unless authorized pursuant to and subject to State law, the same as other water rights acquired under subsection (a).

COAL PIPELINE CONSTRUCTION AND MAINTENANCE

SEC. 6. (a) Except as provided in subsection (b), all articles, materials, and supplies used in the construction and maintenance of an interstate coal pipeline distribution system which has been determined to be in the national interest under section 4 shall have been manufactured in the United States substantially from all articles, materials, and supplies mined, produced, or manufactured, as the case may be, in the United States.

(b) The Secretary may, upon application of a person proposing to construct a coal pipeline distribution system, determined to be in the national interest under section 4, exempt such person from the requirements of subsection (a) with respect to the purchase of particular articles, materials, or supplies, if the Secretary determines that —

(1) the cost of imposing such requirements with respect to such articles, materials, or supplies is unreasonable; or

(2) such articles, materials, or supplies or the articles, materials, or supplies from which they are manufactured are not mined, produced, or manufactured as the case may be in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.

(c) The provisions of this subsection shall not apply—

(1) in any case in which the cost of the articles, materials, or supplies purchased is less than $100,000; or

(2) in the case of articles, materials, or supplies purchased pursuant to a contract entered into before the date of enactment of this Act.

(d) For purposes of this section, the term "United States" means the several States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

APPLICATION OF STATE AND LOCAL LAW

SEC. 7. Nothing in this Act shall alter or in any way preempt the applicability of any State or local law, regulation, or rule of law pertaining to the location, construction, operation, or maintenance of an interstate coal pipeline distribution system except where such applicability would have the effect of prohibiting the location, construction, operation, or maintenance of the interstate coal pipeline distribution system.

CONTINUING JURISDICTION OF STATE PUBLIC UTILITY COMMISSIONS

SEC. 8. Nothing in this Act shall be construed to require any forms of automatic pass through of, or preempt the ratemaking authority of any State utility regulatory agency or the Federal Energy Regulatory Commission with respect

to, costs related to construction, operation, and maintenance of any interstate coal pipeline distribution system, whether or not such costs have been provided for by contract between a utility and the interstate coal pipeline distribution system operator.

LIMITATION ON FURTHER REGULATION

SEC. 9. Nothing in this Act shall be construed to authorize the further regulation of, or to relate to or otherwise affect the regulation of, interstate common carriers.

I. PURPOSE OF THE MEASURE

The purpose of the measure, as reported by the Committee on Energy and Natural Resources, is to facilitate the development of interstate coal pipeline distribution systems but subject to the primacy of State law. This is accomplished by granting the Federal power of eminent domain to those interstate coal pipeline distribution systems that are determined by the Secretary of Energy to be in the national interest based on certain statutory findings, while ensuring, through the delegation of Congressional power under the Commerce Clause, primacy of State water law and procedure regarding water used in interstate coal pipeline distribution systems.

II. SUMMARY OF MAJOR PROVISIONS

The major provisions of S. 1844, the Coal Distribution and Utilization Act of 1982, as reported would:

(1) Authorize the Secretary of Energy, upon application of a person proposing to construct an interstate coal pipeline distribution system, to determine whether the construction of such system would be in the national interest. In making such a determination the Secretary is required to make certain statutory findings.

Prior to making a determination of "national interest," the Secretary is required to obtain an antitrust review from the Attorney General as well as provide an opportunity for written comments from any State in which the proposed system will be located or which will be affected by the proposed pipeline. In addition, the determination of the Secretary is to be based on the record as a whole.

(2) Authorize use of the exercise of the power of eminent domain to acquire rights-of-way over, under, upon, or through private lands if the construction of the interstate coal pipeline distribution system has been determined by the Secretary of Energy to be in the national interest. Any action or proceeding to acquire rights-of-way would be subject to certain restrictions regarding application of State laws.

(3) Preserve the application of any State or local law pertaining to the location, construction, operation, and maintenance of an interstate coal pipeline distribution system, except where such application is effectively a prohibition.

(4) Establish the primacy of State water laws relating to the control, appropriation, use, disposal, or distribution of water and the protection and enforcement of water rights with respect to water used in interstate coal pipeline distribution systems.

(5) Require that the applicant for a proposed pipeline compensate the Federal Government for the fair market value of any "Federal coal" precluded from being recovered or the reduction in value of any Federal coal, as a result of the proposed distribution system.

III. Background and Need

INTRODUCTION

The United States has undergone a major transformation in its role as an energy producer in the past two decades. Recoverable reserves of oil and natural gas, fuels upon which we have been particularly reliant, are steadily declining as our nation's energy consumption escalates. Recognizing that our country has close to one-third of the world's recoverable coal reserves, we have made a recent *shift* in fuel use patterns so as to return to greater dependence on coal—our most abundant fossil fuel.

Expansion of transportation facilities and options will facilitate the use of coal in this country. Due to rising domestic transportation costs, many coal users have found it cheaper to import coal from abroad. This trend has not only limited the use of coal in our domestic markets, but has restrained the ability of U.S. coal to compete in world trade.

SHIFT TOWARD COAL

The United States' national energy policy under the last four Administrations has recognized that the increased use of coal is an important factor in moving this Nation toward energy self-sufficiency. This recognition is based on the fact that coal is our most abundant fossil fuel. More than 50 percent of the electricity produced in the United States is generated from coal and approximately 75 percent of all coal used in the United States is burned by utilities to produce electricity. It is likely that coal-fired electrical generating capacity will expand if the cost of transportation of large volumes of coal over long distances is reduced.

The United States is not the only nation which has notably increased its use of coal. In recent years, many industrialized nations also have increased their use of this fossil fuel. This has led to a growing export market which is expected to double in the next ten years. The United States holds a strategic position with respect to realizing the opportunities from an expanded export market. The rise in export demand for coal could contribute to our Nation's economic well-being both by improving our balance of trade, and providing additional jobs for Americans throughout the country. Clearly, the future for an active role in the coal export market appears optimistic if our transportation costs are reasonable enough to be competitive on the world market.

Coal slurry pipelines represent an additional mode of transportation which promises to be environmentally sound and economically feasible. If coal can be transported by coal slurry pipelines more cheaply than by railroads, coal could become more attractive to domestic users. The development of coal slurry pipelines could potentially reduce our dependence on foreign oil and natural gas. In addition, coal slurry pipelines could increase the United States' share of the international coal market by augmenting the coal industry's capacity to deliver coal for export.

Recent legislation bearing on the coal industry has further heightened the need to develop alternative means of coal transportation. The first of these is the Powerplant and Industrial Fuel Use Act of 1978.

This measure encourages the use of domestic coal by prohibiting certain new powerplants and major fuel burning installations from burning natural gas or petroleum.

The second significant piece of legislation is the Staggers Rail Act of 1980 which provides the railroads with greater flexibility in setting rates, including those for the transportation of coal by contract. This Act has resulted in a sharp increase in coal hauling rates. In fact, without effective competition, unregulated rail rates are expected to continue to rise steadily in the years to come.

COAL TRANSPORTATION

Coal is currently shipped principally by railroad and barge and, to a limited degree, by truck. Approximately 65 percent of the coal shipped is by railroad. This accounts for approximately 25 percent of the tonnage and 11 percent of the revenues for Class I railroads on a national basis. For 85 percent of the coal carried by unit trains, no alternative means of transporting the coal from the mine mouth to its point of delivery exists. In regions such as the West, where long hauls make truck competition impractical and inland waterways are not available, 97 percent of the coal produced is transported by the railroads.

On a nationwide basis, the cost of transporting coal by rail from the mine to the powerplant is approximately equal to the price of the coal or about one half of the total delivered cost. In some extreme instances, 70 cents of every dollar of the delivery cost of coal can be attributed to the cost of transportation.

In some instances the costs of transporting low-sulfur coal have led to economic decisions by electric utilities to either not convert certain generating plants to coal or to import coal. This occurred in the cases of the Central Power and Light Company of Corpus Christi, Texas, as well as the Tampa Electric Company of Tampa, Florida, and the Celenese Chemical Company for its plant in Pampa, Texas.

Aside from the cost considerations, the National Energy Transportation Study (NETS) conducted by the Department of Transportation (DOT) and the Department of Energy (DOE) addresses the limitatitons in transport capacity of existing railroads in certain areas. This report concluded that 60 million tons of coal could not be transported from the Powder River Basin in Wyoming and Montana "due to congestion" on the railways in this area.

COAL SLURRY PIPELINES

The technology of coal slurry pipelines consists of grinding the coal or other material to power of sufficiently fine consistency to mix well with water, mixing the powder in approximately equal proportions with water, and pumping it through the pipeline. On the longer pipelines, supplimental pumping plants are generally required at various points. At the receiving end, after the coal is separated from the water it can be burned directly for thermal electric power generation or transferred to other transportation modes. When the water is clarified it can be used for other purposes.

According to the 1978 analysis of coal slurry pipelines by the Office of Technology Assessment, over long distances pipelines represent the least costly means of transporting high annual volumes of coal.

The primary financial advantage of slurry pipelines transport, as opposed to unit transport of coal, is that pipelines are relatively inflation-proof. The greatest expense is the initial construction, a capital investment with a certain fixed interest rate. Operation and maintenance constitute a relatively minor expense. Therefore pipelines are more resistant to inflation due to high fixed costs (approximately 70 percent) and relatively low variable costs (only 30 percent). By comparison, approximately two thirds of rail rates are composed of variable costs, and one-third of fixed costs.

The technical and economic feasibility of coal slurry pipelines has been demonstrated in two projects. The first coal slurry pipeline was developed in Ohio in 1957. The 10-inch pipeline, built to offset high coal rates, ran 108 miles from Cadiz, in southeastern Ohio, to Eastlake, in suburban Cleveland. This line operated for 6 years with a capacity of 1.3 million tons of coal per year before being underpriced by the introduction of unit trains.

The second coal slurry pipeline, the Black Mesa Pipeline, currently in operation, runs 273 miles from the Black Mesa mine on Navajo land in northeastern Arizona, to the Majave Power Plant in extreme southern Nevada. The 18-inch diameter pipe has a capacity of 4.8 million tons of coal per year.

Several companies have announced plans for construction of coal slurry pipelines to transport coal from mine sites to power plants and other consumers. At least nine additional coal slurry pipeline systems have been proposed. In 1973 the Energy Transportation System Incorporated (ETSI), announced plans for a 1,030-mile coal slurry pipeline to run from the Gillette, Wyoming area to the Pine Bluff, Arkansas area. Current plans would extend the line to Baton Rouge, Louisiana. The proposed pipeline would be 30-inch diameter with a capacity of approximately 25 million tons of coal per year. The principal purchaser of the coal would be Arkansas Power and Light Company, a subsidiary of Middle South Utilities Incorporated. Construction of the ETSI pipeline is to begin in 1983 with operation by 1985.

Another major pipeline is the Coalstream Pipeline, a 1,500-mile coal slurry pipeline from Appalachia and the Illinois basin to Georgia and Florida, at a cost of $3 billion. Smaller-capacity coal slurry pipelines under consideration include:

(1) a 1,100-mile, 7-million-tons-per-year line from northwest Colorado to the Houston, Texas, area—the San Marco Pipeline;

(2) a 180-mile, 10-million-tons-per-year line from Utah to Nevada;

(3) a 350-mile, 5-million-ton pipeline from western Virginia to Hampton Roads, owned by the Virginia Electric Power Company;

(4) a 1,100-mile, 24-million-tons-per-year pipeline from Wyoming to Oregon, known as the NICES system (Northwest Integrated Coal Energy System);

(5) the Pacific Bulk Pipeline, a 650-mile, 10-million-tons-per-year proposal from Utah to southern California;

(6) a 1,260-mile, 30-million-tons-per-year line from Montana to Texas owned by Texas Eastern Transmission Corporation; and

(7) the Powder River Pipeline, a large-volume pipeline from Montana to utilities in the Midwest.

FEDERAL POWER OF EMINENT DOMAIN

In the 1860's and 1870's the land grant railroads obtained Federal eminent domain authority in order to foster the expansion of the West. The principal precedent for the granting of the power of eminent domain is that granted to natural gas pipelines by the 1947 amendment of the Natural Gas Act (15 U.S.C. 717f(h)). Oil pipelines were authorized to use the Federal power of eminent domain during World War II under the war powers of the Cole Act. Federal Power Commission licensees for hydroelectric projects can also use eminent domain. Eminent domain authority was similarly extended to electric transmission lines.

Coal pipelines, like gas and oil pipelines, and the railroads, represent means of long-distance transportation. Thus, granting coal pipelines the right of Federal eminent domain authority would be consistent with the authority which has been extended to these other forms of transportation in preceding years.

The development of an interstate coal pipeline network has been impeded by the difficulty of obtaining rights-of-way within each State. The ETSI Coal Pipeline project, which is soon to begin construction, highlights the difficulties faced in trying to obtain rights-of-way across railroad property. ETSI has only now obtained the rights-of-way necessary for the pipeline after winning 65 law suits against the Union Pacific railroad. The delay caused by lengthy litigation has increased the cost of the project from $800 million to $3.5 billion. Furthermore, the success of the ETSI litigation was based on the terms of the Federal grants of rights-of-way to the Union Pacific railroad. It is unlikely that similar litigation would succeed in the non-public land States.

The importance of granting interstate pipelines Federal eminent domain authority is further borne out by the inconsistencies in State laws governing eminent domain authority for coal slurry pipelines. Several States are subject to statutes which prohibit them from granting eminent domain authority to such projects unless the pipelines are of public use and benefit to the people of the State. This criterion is virtually impossible to meet in those States which are traversed by pipeline but are not the repository of its coal and so not served by the pipeline.

Granting Federal eminent domain authority to coal slurry pipelines will facilitate the development of this new and progressive mode of transportation. Competition in the transportation of coal will help ensure increased efficiency and lower prices to consumers of coal. This new technology, given the opportunity to compete, will help our Nation in its goal to utilize its vast coal reserves and to become a more effective competitor on the world market.

APPLICATION OF STATE WATER LAW

The application of State water law was a major focus of Committee attention. Perhaps no element of the development of interstate coal pipeline distribution systems has been as controversial as the potential impact of such development on scarce Western water supplies and the right of States to allocate water within their boundaries. This controversy was further stimulated by the agreement between the Energy Transportation System Inc. (ETSI) and the State of South Dakota to use 15,000 to 20,000 acre-feet per year of ground water from the Madison formation to support operation of the ETSI pipeline.

Several States thus have expressed concerns regarding the validity and application of State water laws in the State of origin of water supplies. In addition, States which are not the origin of water supplies, but share in the water supplies, particularly groundwater supplies, or are within the same river-basin, have become increasingly concerned for the protection of their interests should any water be diverted for use in an interstate coal pipeline distribution system.

These concerns have been further heightened by the suggestion by recent court decisions that the current status of relevant Constitutional law is unsettled in this area. Because of these concerns the bill provides for the Primacy of State Water Law and procedures regarding water used in interstate coal pipeline distribution systems.

IV. Legislative History

On November 12, 1981, Senator Johnston introduced S. 1844, the Coal Distribution and Utilization Act of 1982. The measure is cosponsored by Senators Weicker, Bradley, Bumpers, Murkowski, Hawkins, Matsunaga, Goldwater, Humphrey, Nickles Boren, Levin, Stevens, and DeConcini.

Similar bills have been considered in previous Congresses by the Committee on Energy and Natural Resources beginning in 1974 when S. 2879 (93d Congress) was favorably reported by the Committee and passed the Senate by voice vote. In subsequent Congresses similar bills were introduced in the Senate and House of Representatives. None were enacted into law.

Following introduction of S. 1844 in this Congress, the full Committee held hearings on May 10 and June 8, 1982. Testimony was received from Administration and public witnesses. In addition, Executive Communications were received from the Department of Commerce and the Department of Transportation.

Similar legislation, H.R. 4230, is pending before the House of Representatives. The companion measure was reported by the Committee on Interior and Insular Affairs on January 29, 1982, and by the Committee on Public Works and Transportation on August 10, 1982.

V. Committee Recommendations and Tabulation of Votes

The Committee on Energy and Natural Resources, in open business session on August 5, 1982, by a vote of 14 yeas to 6 nays of a quorum present recommends that the Senate pass S. 1844, the Coal Distribution and Utilization Act of 1982, as amended.

During the consideration of the bill by the Committee, voice and rollcall votes were taken on amendments offered to the bill. These votes were taken in open business session, have been announced publicly by the Committee, and are included in the minutes of each session in accordance with the requirements of section 133(b) of the Legislative Reorganization Act of 1946, as amended.

The rollcall vote on reporting the measure was 14 yeas and 6 nays as follows:

YEAS	NAYS
Mr. McClure	Mr. Domenici
Mr. Hatfield	Mr. Wallop
Mr. Weicker [1]	Mr. Warner
Mr. Humphrey	Mr. East [1]
Mr. Murkowski	Mr. Metzenbaum [1]
Mr. Nickles	Mr. Melcher
Mr. Heinz [1]	
Mr. Jackson [1]	
Mr. Johnston	
Mr. Bumpers	
Mr. Ford	
Mr. Matsunaga [1]	
Mr. Tsongas [1]	
Mr. Bradley	

[1] Indicates vote by proxy.

VI. Committee Amendments

The Committee amended S. 1844, the Coal Distribution and Utilization Act of 1982, to strike all after the enacting clause and insert a substitute text. Aside from technical, clarifying and conforming amendments, the following substantive changes were made by the Committee to the bill as introduced.

S. 1844, as introduced, focused primarily on facilitating the development of interstate coal pipeline distribution systems by use of Federal eminent domain power for certain pipelines determined to be in the national interest. Section 6 of the introduced bill, entitled "Preservation of State Water Law," sought to ensure that the applicability of State water law for the water used in coal slurry pipelines determined under this legislation to be in the national interest was preserved, notwithstanding the enactment of this Federal legislation intended to facilitate the development of such pipelines, or the interstate commerce nature of such pipelines under the Constitution. It was the stated intent of the sponsors of this legislation to provide primarily for the availability of Federal eminent domain power, but to do so with a statutory preservation or savings of State water law related to pipelines assisted under this legislation.

The Committee amendment in the nature of a substitute incorporates several new or modified provisions which are intended to present a clear and express statement by Congress regarding the relationship of State water law to all interstate coal slurry pipelines, including those granted the power of eminent domain under this Act. The findings included in subsection 2(a) have been expanded by the addition

of paragraphs (7), (8), and (9), which collectively declare that the primacy of State water law is a superior national interest to the development of interstate coal pipeline distribution systems; and correspondingly, that the need for such systems is subservient to such primacy. The puprposes of the legislation in subsection 2(b) have been modified to declare that the facilitation of the development of interstate coal slurry pipelines must be conditioned upon the primacy of State water law. The ability of any person proposing to construct a coal slurry pipeline who wishes to apply for a national interest designation under section 4, has been modified to be conditioned upon the prior filing for, and approval of, necessary water permits or other authorizations under applicable State law, thus ensuring that there cannot be a national interest determination for purposes of access to Federal eminent domain powers unless State water law has been satisfied. Section 4 is modified further in subsection (c), to include an affirmative requirement for prior Federal consultation with States in which a coal slurry pipeline system would be located and with States which would otherwise be affected by such a pipeline, thus further ensuring that any State with a water interest in the coal slurry pipeline will have the opportunity to present its comments to the Secretary of Energy prior to any national interest determination being made. Subsection 4(e)(2) establishes that the Federal eminent domain authority made available in the subsection shall not be construed to include the acquisition of any water rights. Subsection 4(e)(3) negates the possibility of interpreting the use of the eminent domain authorities as creating a Federal project for purposes of the application for or assignment of water rights. These paragraphs thereby expressly negate any arguable implication that the availability or use of Federal eminent domain power under this subsection would in any manner affect the primacy of State water law established in section 5.

Section 5 of the Committee amendment, entitled "Primacy of State Water Law", is the companion section for section 6 in the introduced legislation, which dealt with the preservation of State water law. Section 5 establishes the absolute primacy of the State water law not only for coal slurry pipelines which have applied for or have been determined to be in the natitonal interest under section 4, but also for all other interstate coal slurry pipelines.

The Committee amendment also includes a new section 7, entitled "Application of State and Local Law" dealing with State and local laws other than State water law. It is particularly noteworthy that this new section constitutes a savings clause for all State and local laws pertaining to the location, construction, operation or maintenance of a coal slurry pipeline, thus preserving such laws from any implication of preemption, but makes the applicability of those laws conditional on an exception where such applicability would have the effect of prohhibiting actitvities related to the pipeline. By comparison, section 5 and related provisions of the bill do not contain any conditions on the primacy of State water law.

The Committee's action in adopting the amendment in the nature of a substitute, as described in the preceding paragraphs, reflects the essential nature of the compromise struck by the Committee in its con-

sideration of Federal assistance for "national interest" pipelines. In effect, the Committee has reported substitute legislation which has two purposes: (1) access to Federal eminent domain powers for "national interest" pipelines; and (2) the absolute primacy of State water law applicable to all interstate coal pipeline distribution systems. This duality of purpose reflects the Committee's conclusion that the limited Federal assistance for certain coal slurry pipelines (i.e., access to Federal eminent domain powers) should only be provided in Federal legislation which also establishes beyond question the greater national interest in the primacy of State water law. The Federal purpose, then, expressed in the reported Committee amendment, incorporates these different inextricably linked purposes without which the bill could not and would not have been favorably reported. Stated another way, the Committee intends that the eminent domain provisions of this Act be narrowly construed. The Committee does not intend these provisions to be construed as an "intention of Congress to secure a comprehensive development of national resources . . ." as was found in *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission*. 328 U.S. 152 (1946). There is no intent to generally legislate in this field, but rather, the intent is to grant a well-defined and specifically limited authority for the potential use of the power of eminent domain by private parties constructing coal slurry pipelines subject to the primacy of State water law. By contrast, the provisions related to State water law are expressly intended by the Committee to be a broad delegation of power, and to be so construed. The Committee recognizes that this policy may result in a nonuniform set of laws governing the availability or use of water in coal slurry pipelines, but concludes that the greater national interest resides in protecting and maintaining the primacy of State water law, including interstate compacts regarding the allocation of water.

The Committee adopted this policy after receiving expert testimony on both water and Constitutional law. It conducted a careful review and analsyis of both longstanding Congressional policy regarding the sanctity of State water law, and the judicial interpretations of relevant State and Federal statutes, including the most recent decisions by the U.S. Supreme Court in *New England Power Co.* v. *New Hampshire* —— U.S. ——, 102 S.Ct. 1096, 17 L.Ed.2d 188 (1982) and *Sporhase* v. *Nebraska* 50 U.S.L.W. 5115 (July 2, 1982).

Beginning with the Act of July 26, 1866 (14 Stat. 251), Congress expressly confirmed water rights acquired in accordance with State law in numerous statutes which have been the subject of equally numerous judicial interpretations. Generaly, in examining the validity of a particular State law or action against a particular Federal statute including water provisions, the Courts have sought to define the extent to which Congress has clearly expressed the realtionship of the provisions to powers under the Commerce Clause (Article I. § 8. Clause 3 of the U.S. Constitution), the Supremacy Clause (Article VI, Clause 2 of the U.S. Constitution), and the intended purpose of the statute as a whole.

Under the Commerce Clause of the Constitution, Congress has plenary power to regulate interstate commerce. It is empowered to determine whether the interests of the nation are better served by uniform

Federal regulation, or by nonuniform or more restrictive State control. Where the Constitution grants to Congress the power to legislate, it may discharge its legislative function by adopting State laws, present or prospective. *United States* v. *Sharpnack*, 355 U.S. 286 (1958); *Prudential Insurance Co.* v. *Benjamin*, 328 U.S. 408 (1946). It may also remove the obstacles to State legislation which will permit the State itself to legislate directly on the subject. *Butte Ctiy Water Co.* v. *Baker*, 196 U.S. 119 (1905); *In re Rahrer*, 140 U.S. 545 (1891). Moreover, the United States Supreme Court has recently reconfirmed that Congress may "confer upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy." *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 44 (1980). This is true notwithstanding the fact that the Commerce Clause contains an implied limitation on the power of the States to burden interstate commerce. *See Cooley* v. *Board of Wardens*, 53 U.S. 299 (1852). For, "if Congress ordains that the States may freely regulate an aspect of interstate commerce, any action taken by a State within the scope of the Congressional authorization is rendered invulnerable to Commerce Clause challenge." *Western & Southern Iife Insurance Co.* v. *State Board of Equalization*, 451 U.S. 648, 652–3 (1981). Also see *New England Power Co.* v. *New Hampshire*, —— U.S. ——, 102 S.Ct. 17 L.Ed. 2d 188 (1982).

As Chief Justice Stone stated in *Southern Pacific Co.* v. *Arizona* (325 U.S. 761, 766–7 (1948),

> Congress has undoubted power to redefine the distribution of power over interstate commerce. It may either permit the states to regulate the commerce in a manner which would otherwise not be permissible, or exclude state regulation even of matters of peculiarly local concern which nevertheless affect interstate commerce. (Citations omitted)

More recently, in the *New England Power Co.* case, Chief Justice Berger pointed out in the unanimous opinion of the Court,

> It is indeed well settled that Congress may use its powers under the Commerce Clause to confer upon the States an ability to restrict the flow of interstate commerce that they would not otherwise enjoy. The dispositive question, however, is whether Congress in fact has authorized the States to impose restrictions of the sort at issue here. (Slip opinion, p. 8; citations omitted)

Moreover, in summarizing the history of Congressional enactments regarding State water law and judicial interpretations regarding State water law and judicial interpretations in *Sporhase*, Justice Stevens stated,

> Although the 37 statutes and the interstate compacts demonstrate Congress' deference to State water law, they do not indicate that Congress wished to remove Federal constitutional constraints on such State laws. The negative implications of the Commerce Clause, like the mandates of the Fourteenth Amendment, are ingredients of the *valid* state law to which Congress has deferred. Neither the fact that Congress

> has chosen not to create a Federal water law to govern water rights involved in Federal projects, nor the fact that Congress has been willing to let the States settle their differences over water rights through mutual agreement, constitutes persuasive evidence that Congress consented to the unilateral imposition of unreasonable burdens on commerce. In the instances in which we have found such consent, Congress' "intent and policy to sustain State legislation from attack under the Commerce Clause" was "expressly stated". (Slip opinion, pp. 17–18; citations omitted)

The Committee intends that the language of the Committee amendment in Sections 2(a)(7), 2(a)(8), 2(a)(9), 2(b), 4(a)(1), 4(e)(2), 4(e)(3), and 5 constitutes a clear and "expressly stated" "intent and policy" as stated by Justice Stevens in *Sporhase*, giving the consent of Congress under the Commerce Clause, necessary to allow the states to regulate commerce through the application of State water laws to interstate coal pipeline distribution systems in a manner which could be otherwise impermissible. The Committee in the words of Chief Justice Burger in *New England Power Co.* "in fact has authorized the States to impose restrictions" on commerce. It is the unequivocal intent of this bill to establish the primacy of State water law by authorizing the States to impose restrictions on interstate coal slurry pipelines which conceivably might otherwise be argued unilateral impositions of unreasonable burdens on commerce absent this legislation and to sustain such "State legislation from attack under the Commerce Clause". If a State has granted the necessary water rights under State law for operations to begin for a "national interest" pipeline, or any other interstate pipeline, and then subsequent State action pursuant to applicable State law, alters, restricts, or terminates the operations of the pipeline, this legislation would ensure that such State action would be constitutionally valid. The fact that coal slurry operations in interstate commerce would have begun would not diminish the primacy or applicability of State water law to such a coal slurry pipeline. The continued application and primacy of State water law through any subsequent State action after construction and initial operation of the pipeline cannot be interpreted to be an unreasonable burden on interstate commerce. This legislation ensures that State water law shall control for the duration of the pipeline operations and shall not be subject to any preemption by application of the Commerce Clause.

In the *Sporhase* case, which concerned the application of a Nebraska statute banning the export of groundwater to another State unless that State has a law granting reciprocal rights to export water into Nebraska, the Court applied a traditional Commerce Clause analysis, involving a balancing between legitimate state interest and its burden on commerce. The Committee intends that the continued application and vitality of State water law applicable to interstate coal slurry pipelines shall not be dependent upon any such Constitutional analysis of the legitimacy of the interests the State is seeking to protect as related to the reasonableness of any burden on interstate commerce which may be imposed by State water law. The Committee has affirmatively considered such Constitutional questions, and by the provisions

of the Committee amendment has expressly disposed of them in favor of State water law. In so doing, the Congress will have also, as discussed previously, concluded that existing as well as future State water law applicable to coal slurry pipelines shall come under the primacy provisions of this law. Consequently, new State water law statutes or amendments to existing statutes which are applicable to coal slurry pipelines, shall be considered to have such primacy under the legislation.

The Committee appreciates that some case law, such as *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission* 328 U.S. 152 (1946) has been argued to stand for the legal proposition that Congress has been unsuccessful in laws such as the Federal Power Act in preserving State water law through the statutory provision of savings clauses. The Congressional intent and primary legal theory here is diametrically opposed to any such arguments and analyses. Here, regardless of the body of scholarly legal opinion on the state of existing law in the general issue of State water law under the Constitution, Congress will have enacted pursuant to its Commerce Clause powers, Federal legislation to ensure an express and absolute protection and primacy of State water law for all interstate coal slurry pipelines, not merely a legislative "saving" of such laws.

An important element of the Committee amendment's approach to water law is the recognition and preservation of interstate compacts governing the appropriation, purchase, transfer, use or diversion of water. Interstate compacts historically has been the legal vehicle ratifying interstate agreements governing water allocation among several States with interests in a source of water. Such interstate compacts are unaffected by this legislation and are applicable as a part of State water law to all interstate coal slurry pipelines. The Committee intends that the legal sufficiency and primacy of any Congressionally approved interstate compacts now in existence or subsequently adopted will be unquestioned despite the enactment of this legislation. Therefore, any interstate coal slurry pipeline, whether determined to be in the national interest or not, will be subject to any applicable interstate compact governing water appropriation, purchase, transfer, use or diversion, and all such pipelines must be in conformance with such interstate compacts. The Committee believes that interstate compacts are appropriate vehicles for States to use to determine allocations of water among themselves, as well as to ensure that their respective water interests are protected during the construction and operation of any coal slurry pipeline affecting such interests. The Committee encourages the several States who have water availability interests in proposed coal slurry pipeline systems to consider the establishment of an interstate compact to ensure the protection of their interests, to the extent they have not already done so.

The Committee-reported amendment thus reflects the Committee's conclusions and intentions with regard to interstate coal slurry pipelines and the applicability of State water law. The Committee does not intend to imply that the scheme it has adopted here to establish the primacy of State water law is the only one which Congress might adopt to accomplish the same end. The Committee notes in that regard that the House Committee on Interior and Insular Affairs and the

House Committee on Public Works and Transportation have reported companion legislation, H.R. 4230, with related provisions and a similar intent expressed in the respective committee reports H. Repts. 90–423, parts I and II).

Further, the Committee during its consideration of this legislation necessarily took notice of the general state of the law regarding State water law under the Constitution of the United States, whether or not interstate coal slurry pipelines were the direct subjects of Federal action under this legislation. The Committee's action in fashioning the several provisions related to State water law applicable to coal pipelines is not intended to be any general Congressional statement, expressed or implied, with regard to State water laws or their primacy in our federal Constitutional scheme of laws. The Committee has not, and does not, take a position on the validity of any individual State water law in any fact situation other then under this legislation. Further, the Committee expressly reserves its position and any subsequent opinion on the broader issues of State water law in existing law and on the conclusion it might reach with regard to the applicability of State water laws in other arguable interstate commerce situations. Any such positions and opinions of the Committee should not be inferred from the reported Committee amendment nor this discussion. Neither does the Committee intend to create any implication that Congress is expanding any Federal jurisdiction which may exist regarding water.

The Committee amendment also addresses the use of Federal reserved water in coal slurry pipelines in Sections 4(e)(3), 5(c)(3), and 5(d), which are patterned on Section 178 of the Energy Security Act, Public Law 96–294, 94 Stat. 611 (June 30, 1980). These sections make it clear that: (1) a coal slurry pipeline does not become a federal project by virtue of the eminent domain authority under section 4 for the purpose of applying for or assigning water rights; (2) the Act does not confer upon any non-federal entity the right to the waters of any stream or underground water resources; and (3) any water to which a federal right can be asserted may be used for coal slurry pipelines only if authorized pursuant to State substantive and procedural law. Clearly, the Committee does not intend to create any federal reserved water right by this Act. Moreover, any existing Federal water right must be authorized in conformance with and subject to State law.

The Committee adopted several amendments to the definition of "interstate coal distribution system" which limited the breadth of the definition as it relates to eminent domain.

In addition, the Committee adopted an amendment to the definition of interstate coal pipeline system as defined in section 3(2) to ensure that Federal eminent domain authority is available to certain coal pipelines in Alaska. The following situations are covered: (1) the coal pipeline originates in Alaska and moves Alaskan coal to Canada or through Canada to the lower 48 States; (2) the coal pipeline is constructed in Alaska to move Alaskan coal to a facility in Alaska where the coal is loaded aboard a vessel for export to another country, a territory of the United States, or one of the other States of the union; or (3) in either of the above situations some of the Alaskan coal is used in Alaska. This treatment would apply only for Alaskan pipelines and not for wholly intrastate pipelines in any other State.

VII. Section-by-Section Analysis

Section 2—Findings and Purposes

Section 2(a) sets forth the Congressional findings that provide the factual basis for the legislation. Included in the findings is a determination that the construction of interstate coal pipeline distribution systems is a "beneficial public use" that justifies delegating to any such pipeline the Federal power of eminent domain, if the pipeline is found to be in the national interest.

The findings also include a statement of Congressional policy governing the relationship between the need for coal pipelines and State water laws and interstate compacts on the allocation of water. The policy states that State water law and compacts are a carefully balanced system for the allocation of water, that coal pipelines must be developed within the context of that system even if a burden on interstate commerce might result, and that the interest in developing coal pipelines is subservient to the national interest in the primacy of State water law and interstate compacts concerning water allocation.

These findings, in conjunction with the statement of purpose in section 2(b), establish unequivocably that the eminent domain provision in S. 1844 is controlled by, and wholly subservient to, the Primacy of State Water Law (section 5). In addition, the findings in sections 2(a) (8) and (9) indicate the express intent of the Congress that its authority under the Commerce Clause be delegated to the States in order to establish the primacy of State law over water used for an interstate coal pipeline distribution system. This delegation is effective as relates to all State water laws, existing as of the enactment of this Act, including anti-export and reciprocity statutes, as well as prospective laws. (See the Committee amendment section for the general discussion of the intent of the Committee regarding the application of State water law.)

Section 2(b) contains the purpose of the Act, which is to facilitate the development of interstate coal pipelines by granting the Federal power of eminent domain to those pipelines that are determined to be in the national interest based on certain statutory findings. The achievement of this objective is expressly, conditioned by statute on, and unequivocably subject to, compliance with State water laws and interstate compacts through the delegation of Congressional power under the Commerce Clause so as to continue the primacy of State water law and procedures regarding water. To this end the bill finds in sections 2(a) (7) through (9) that—

> "(7) State water law and interstate compacts are carefully balanced and structured systems for the allocation of water;
>
> "(8) the national interest is best served by developing interstate coal pipeline distribution systems only in the context of those State laws and interstate compacts, notwithstanding the potential burden on interstate commerce; and
>
> "(9) the need for a national coal distribution system is subservient to the national interest in the primacy of State water law and interstate compacts on the allocation of water."

A general discussion of the application of State water law to interstate coal pipeline distribution systems is set forth in the Committee amendment section of this report.

Section 3—Definitions

Section 3(1) defines "coal" as any of the recognized classifications of coal, including anthracite, bituminous, semibituminous, subbituminous, and lignite.

Section 3(2) defines "interstate coal pipeline distribution system" in terms of three elements: the entry points and delivery location of the coal; the primary purpose of the pipeline; and the components of the pipeline system. As such the system includes the physical apparatus and facilities for the utilization of water from the point of appropriation to the point of use (See discussion on section 3(4)).

Subsection 3(2) allows the Federal power of eminent domain to be used by coal pipeline distribution systems built and operated entirely within the boundaries of Alaska, provided that these pipeline systems meet the criteria set forth in section 4. As aforementioned, the following pipelines in Alaska are covered: (1) the coal pipeline originates in Alaska and moves Alaskan coal to Canada or through Canada to the lower 48 States; (2) the coal pipeline is constructed in Alaska to move Alaskan coal to a facility in Alaska where the coal is loaded aboard a vessel for export to another country, a territory of the United States, or one of the other States of the union; or (3) in either of the above situations some of the Alaskan coal is used in Alaska. This treatment would apply only for Alaskan pipelines and not for wholly intrastate pipelines in any other State.

Included in the definition of "interstate coal pipeline distribution system" is the following statement: "Access to water for the operation and maintenance of the pipeline shall be governed by State laws and procedures except where application of such State laws and procedures would prohibit such access." It is the intent of the Committee that the term "access to water," as used in the preceding statement, refers solely to the physical structures and facilities that provide access to water, that is, those facilities necessary for the transportation of that supply from the point of appropriation to the point of use in the pipeline. The acquisition, construction and use of those structures would be subject to State laws and procedures, unless those laws and procedures would prohibit such acquisition, construction and use. In that event, but only to the extent necessary, such laws and procedures would be preempted by S. 1844.

The term "access to water" is not intended to encompass any legal right to water. Rather, thet term relates to water rights only to the extent that any facilities that might be used in connection with the exercise of a water right will be governed by State law, even though such facilities are not expressly included in a State water right statute.

Any right of way that might be needed for the conveyance of water, from the point of its diversion to the point of its use in a pipeline, would be necessary for operation of the pipeline and therefore is included in the definition of "right-of-way" set forth in section 3(4). Accordingly, any such right-of-way for the transportation of water may be obtained, pursuant to section 4, through the delegated Federal powers of eminent domain, and any State laws that would otherwise prohibit the acquisition of such right-of-way would not apply.

Of course, any right to use water would have to be acquired pursuant to State law. Such water right also would have to be acquired as a condition precedent for an application pursuant to section 4(a).

The definition of "private lands" in section 3(3) makes clear that the Federal eminent domain power granted in section 4(e) cannot be used to acquire rights-of-way over land owned by the Federal Government or any State or political subdivision thereof, certain lands owned by or held in trust for, an Indian or Indian tribe, or certain lands transferred to a regional or village corporation established under the Alaska Native Claims Settlement Act.

Section 3(4) defines "right-of-way" as such interest in land as may be necessary for construction, operation, and maintenance of an interstate coal pipeline distribution system. Thus the right-of-way *per se*, under the bill, would be such land as necessary for construction, operation, and maintenance of the pipeline system. As such "rights-of-way" would include corridors for the physical apparatus and facilities for the utilization of the water from the point of appropriation to the point of use. (See discussion on section 3(2).)

Section 4—Eminent Domain Authority

Section 4 establishes the procedural requirement for the granting of the Federal power of eminent domain to any person proposing to construct an interstate coal pipeline distribution system.

Authority To Make National Interest Findings

Section 4(a) requires that an application for a coal pipeline system be filed with the Secretary of Energy. Upon receipt of an application, the Secretary is authorized and directed to determine whether the construction of the proposed pipeline would be in the national interest.

As a precondition to filing an application, each applicant is required to obtain all necessary permits or other authorizations for the "reservation, appropriation, use, or diversion of water under applicable State law" before the Secretary of Energy can entertain an application for eminent domain. This provision requires acquisition of a water permit or other appropriate authorization rather than acquisition of a perfected water right from a state. Requiring acquisition of a perfected water right would place an eminent domain applicant in an untenable situation, since many States require the completion of construction of works and the application of the water to the intended beneficial use in order to perfect the water rights.

It is the intent of the Committee to prevent the simultaneous filing and parallel processing of applications, one for eminent domain authority and one or more for the acquisition of the necessary water supply. Because compliance with State water laws is a condition precedent to obtaining Federal eminent domain authority, such compliance must be demonstrated before the Secretary of Energy commences his review.

Section 4(a)(2) requires that the Secretary, when he makes the "national interest" determination, must base the decision on the record as a whole, and he must take into consideration each of the five criteria prescribed in subsection (b)(1). As discussed subsequently this determination would be subject to title V of the DOE Organization Act as well as section 4(h) of this bill.

Findings

Section 4(b) requires the Secretary of Energy to make findings on five specified criteria in determining whether a proposed pipeline would be in the national interest. The findings would consist of assessments of the extent to which the proposed pipeline would (a) assist in meeting the national demand for coal and the need for coal transportation; (b) enhance competition; (c) contribute to the national security; (d) result in economic benefits, and (e) effect the environment, compared to the environmental impacts of certain alternatives.

The finding required by subsection 4(b)(5) regarding effects on the environment is intended to encompass only realistic alternatives, such as those specified in that subsection. Moreover, the finding is not intended to serve as a substitute for an environmental assessment or an environmental impact statement, if either should be required. In other words, the National Environmental Policy Act applies by its own terms.

The determination by the Secretary under section 4(a) and the findings under section 4(b) would be by order. The DOE Organization Act, in turn, provides that any rule, regulation or order (with the effect of a rule) issued by the Secretary of Energy shall be subject to the Administrative Procedures Act (APA), unless specific provisions of title V of the DOE Organization Act create exceptions to that requirement. Thus, the Secretary's determination under section 4(a) and his findings as required by section 4(b) would be subject to the APA.

In addition the requirement of section 501(c) of the DOE Organization Act would apply. Section 501(c) requires that with respect to any rule, regulation or order, if it would have a substantial impact on large members of individuals or business, or if a substantial issue of fact or law exists, an opportunity for oral presentation of views, data and arguments shall be provided. In addition, section 4(h) requires the promulgation of rules and regulations for the expeditious exercise of the authority granted in section 4.

State Consultation

Section 4(c) authorizes State participation in the factfinding process conducted by the Secretary of Energy as part of the "national interest" determination required by subsection (a). Prior to making the findings prescribed by subsection (b), the Secretary is required to provide an opportunity for written comments from any State in which a proposed pipeline is located, or any State otherwise affected by a proposed pipeline. Particular importance was placed on providing an opportunity for the basin States to comment.

Antitrust Review

Section 4(d) requires the Attorney General to assess the antitrust implications of any application filed with the Secretary of Energy pursuant to section 4(a). Within 120 days after receiving notification of the application, the Attorney General must complete an antitrust review. The review must include an analysis of the likely effects upon competition of approval of the application, and any findings and recommendations concerning terms and conditions deemed necessary to protect and promote competition. As a condition precedent to approval

of an application by the Secretary, the Attorney General must advise the Secretary, in writing, that the application is consistent with the antitrust laws.

Eminent Domain Authority

Section 4(e)(1) delegates the Federal eminent domain power to any person proposing to build an interstate coal pipeline, if the Secretary of Energy, pursuant to subsection (a), has determined that construction of the pipeline would be in the national interest. The applicant is permitted to choose either Federal or State courts as the forum for individual eminent domain proceedings. However, this subsection also provides that with one exception, any such proceeding shall conform to the laws, practices and procedures relating to the general eminent domain law of the State in which the property is situated. The exception to this requirement relates to any State law, practice or procedure that would have the effect of prohibiting the acquisition of a right-of-way under this section. Any such law, practice or procedure would not be applicable to any eminent domain proceeding conducted pursuant to the authority conferred by section 4(e).

Sections 4(e) (2), (3) and (4) contain limitations on the eminent domain power authorized by subsection (1). Paragraph (2) provides that such power cannot be used to acquire any right to take, use, dispose of, or develop water. Under paragraph (3), the use of the Federal eminent domain power in constructing a project does not transform the project into a Federal project for purposes of the application for, or assignment of, water rights. Paragraph (4) prohibits the acquisition of any right-of-way located on an official historic site or on any land designated as a wilderness or a wildlife refuge, unless there is no feasible or prudent alternative to the acquisition and reasonable planning is made to minimize any harm resulting from the acquisition.

Alternative Routes

Section 4(f) permits a pipeline applicant to amend his application by altering the proposed location of the right-of-way for any segment of the pipeline. Moreover, the Secretary of Energy is authorized to require such relocation if it meets the criteria set forth in the subsection.

Payment for Federal Coal

Section 4(g) requires the Secretary of the Interior to review any application filed pursuant to section 4(a) for the purpose of enhancing the ability of the United States to realize the value of any Federally-owned mineral interest in coal or land to be crossed by the proposed right-of-way. In addition, the Secretary of the Interior is required to take certain specified steps to enhance the recovery of Federal coal, and to establish the fair market value of any Federal coal that cannot be recovered because of the pipeline location, and the reduction of the fair market value of Federal coal which will be more costly to recover because of the pipeline. Section 4(g) directs the Secretary of Energy to require the pipeline applicant to pay to the United States the amount established by the Secretary of the Interior.

It is the intent of the Committee that the provisions in section 4(g) would not effect the implementation of other Federal land manage-

ment laws. For example, subsection (g) would not change existing law or procedures with respect to determining the value of a Federal interest in a mineral deposit, authorizing the taking of an interest in land affecting the value of such a Federal interest, or establishing the fair market value of the Federal interest.

Rules and Regulations

Section 4(h) directs the Secretary of Energy to promulgate such rules and regulations as are necessary for the expeditious exercise of the authority granted in section 4. Title V of the Department of Energy Organization Act would apply.

In turn, the DOE Organization Act provides that any rule, regulation or order (with the effect of a rule) issued by the Secretary of Energy shall be subject to the Administrative Procedures Act (APA), unless specific provisions of title V of the DOE Organization Act create exceptions to that requirement. Thus, the Secretary's determination under section 4(a) and his findings as required by section 4(b) would be subject to the APA.

In addition the requirement of section 501(c) of the DOE Organization Act would apply. Section 501(c) requires that with respect to any rule, regulation or order, if it would have a substantial impact on large numbers of individuals or businesses, or if a substantial issue of fact or law exists, an opportunity for oral presentation of views, data and arguments shall be provided.

Section 5—Primacy of State Water Law

Section 5(a) expressly prohibits any reservation, appropriation, purchase, transfer, use, diversion, dedication or claim to water within any State for *any* interstate coal pipeline unless it takes place pursuant to and in compliance with both the substantive and procedural law of that State relating to the control, appropriation, use, disposal, or distribution of water and the protection and enforcement of water rights. The Committee intends in his subsection, together with the remainder of the section, to clearly establish the primacy of State water law in relationship to all interstate coal pipelines, not just those receiving a grant of eminent domain under section 4. The Committee does not intend to create any implication regarding the primacy of State water law in other areas by its silence.

Reference in section 5(a) to "the substantive and procedural law of the State" relates to State water laws, regulations, and common law, as interpreted by each State's administrative and judicial bodies. This language is intended to mean the State where the diversion takes place, not where the water resource originates, unless they are one and the same. Nothing in this Act is intended to change the relative rights, if any, between States to shared water resources.

Section 5(b) contains a clear and express intent and policy of Congress, acting under its Commerce Clause powers, to delegate to the States the authority to regulate commerce in a manner which would otherwise not be permissible. The section declares that the establishment and exercise of terms or conditions on permits or authorization for the reservation, appropriation, use, or diversion of water for any interstate coal pipeline distribution system shall be determined pursuant to the law of the State which grants such permit or authoriza-

tion, notwithstanding any transportation, use, or disposal of such water in interstate commerce. The States are authorized by virtue of this section to deny the acquisition or exercise of a water right and to impose restrictions on water use, including terms and conditions terminating use, on any interstate coal pipeline which may be unilateral impositions of otherwise unreasonable burdens on commerce. Such State law is intended to be insulated from attack under the Commerce Clause. The Committee intends this section to be construed broadly.

Section 5(c) provides that this Act shall not preempt any provision of State law or of an interstate compact governing the use of water, nor shall this Act preempt any State or Federal law or interstate compact dealing with water quality or disposal. The Committee does not intend to alter the share of water of any interstate water course or aquifer to which any State may be entitled or to which any State may be limited by law governing the allocation between states of the waters of interstate water courses or aquifers. Subsection (c) also states that this Act does not confer any ability to exercise any Federal water right, nor does it affect rights of any Indian or Indian tribe.

Section 5(d) prohibits any interstate coal pipepine from using water to which a Federal right can be asserted, unless such use is authorized pursuant to State law.

Section 6—Coal Pipeline Construction and Maintenance

Section 6(a) establishes a basic requirement that American-made materials and supplies be used in the construction and maintenance of any interstate coal pipeline determined to be in the national interest pursuant to section 4. Specifically, such materials and supplies must be manufactured in the United States, and they must be made "substantially" from materials and supplies mined, produced or manufactured in the United States.

Section 6(b) authorizes exemptions from the requirement imposed by subsection (a). Exemptions may be granted by the Secretary of Energy on the basis of criteria set forth in subsection (b). Moreover, section 6(c) provides an automatic exemption for materials or supplies valued at less than $100,000 or purchased pursuant to a contract executed prior to the date of enactment of S. 1844.

Section 7—Application of State and Local Law

This section provides that State and local laws and regulations are not preempted by S. 1844, unless such laws "would have the effect of prohibiting" the location, construction, operation, or maintenance of an interstate coal pipeline. The provision attempts to strike a balance between (a) the desirability of maintaining State control over facility siting, environmental impacts, and public health and safety matters, and (b) the necessity for overriding any State law that expressly prohibits, or is purposely designed to effectively prohibit, the location, construction, or operation of any coal pipeline within the State. Whether or not a particular State law would have the effect of prohibiting a coal pipeline is a question of fact which, if contested, would be determined by an appropriate court.

This section does not operate to limit the primacy of State water law under section 5 and the requirements in section 4(a)(1) for State

water permits as a condition precedent to an application. Section 7 is applicable to State and local laws other than State water laws.

Section 8—Continuing Jurisdiction of State Public Utility Commissions

Section 8 makes clear that S. 1844 does not require State regulatory agencies to approve any type of electric utility rate adjustment mechanism that would permit the automatic flow-through to utility ratepayers of costs related to construction, operation and maintenance of any interstate coal pipeline. Section 8 also states that S. 1844 shall not be construed to preempt the ratemaking authority of any State regulatory commission or the Federal Energy Regulatory Commission. It is the intent of the Committee that the authority of the State regulatory commissions and the Federal Energy Regulatory Commission over electric utility rates is neither expanded nor contracted by this legislation. Nothing in S. 1844 mandates, suggests, or contemplates any change in utility rate regulation resulting from the generation of electricity by coal transported through a pipeline.

This section also expressly refers to contracts between electric utilities and interstate coal pipelines, and it provides that the two provisions described shall apply whether or not such contracts obligate utilities to pay costs related to pipeline construction, operation and maintenance. Moreover, if a utility with a long-term contract for pipeline-supplied coal attempts to use a fuel adjustment clause to automatically flow through to its ratepayers escalating coal costs paid pursuant to the contract, such an automatic flow-through will be subject to State regulatory commission review.

Section 9—Limitation on Further Regulation

This section provides that S. 1844 shall not be construed to authorize the further regulation of interstate common carriers, nor shall it be construed to relate to or otherwise affect such regulation.

VIII. Cost and Budgetary Considerations

The Committee does not anticipate any significant budgetary impact from enactment of S. 1844. There will be some additional administrative costs by the Federal agencies involved, however. And, in the event that Federal lands are crossed by an interstate coal transportation distribution system, there will be additional Federal revenues as compensation for Federal coal.

The Congressional Budget Office cost estimate for this measure follows:

U.S. Congress,
Congressional Budget Office,
Washington, D.C., August 11, 1982.

Hon. James A. McClure,
Chairman, Committee on Energy and Natural Resources, U.S. Senate, Dirksen Senate Office Building, Washington, D.C.

Dear Mr. Chairman: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed S. 1844, the Coal Distribution and Utilization Act of 1982,

as ordered reported by the Senate Committee on Energy and Natural Resources, August 5, 1982.

The bill is designed to facilitate the interstate distribution of coal. Any person proposing to construct an interstate coal pipeline distribution system may apply to the Secretary of Energy to acquire the rights-of-way through private land by exercise of the power of eminent domain in the United States district court or appropriate state court. To approve such an application, the Secretary of Energy must determine that the pipeline is in the national interest and the Attorney General must find no violations of antitrust laws. In addition, a water permit or other appropriate authorization must be secured under state law for the use or diversion of water. The bill requires the pipeline applicant to pay the federal government an amount equal to the fair market value of coal precluded from being recovered as a result of the proposed right-of-way. The bill also provides that use of water for the pipeline shall be subject to the substantive and procedural law of the state relating to control and use of water.

The annual cost to the federal government will be related to the number of pipeline applications submitted. CBO estimates that evaluating applications as required by this bill would cost the Department of Energy and the Department of Justice at least $100,000 per application. The cost to the Department of the Interior for appraising federal land within a right-of-way is estimated to be at least $100,000 per pipeline. These costs could be offset by payments to the government for the fair market value of coal precluded from being recovered. Payments will depend on the route of the pipeline and cannot be estimated.

Should the Committee so desire, we would be pleased to provide further details on this estimate.

Sincerely,

ALICE M. RIVLIN, *Director.*

IX. REGULATORY IMPACT EVALUATION

In compliance with paragraph 11(b) of Rule XXVI of the Standing Rules of the Senate, the Committee makes the following evaluation of the regulatory impact which would be incurred in carrying out the provisions of S. 1844:

The bill is not a regulatory measure in the sense that it would involuntarily impose Government established standards or significant economic responsibilities on private individuals and businesses. Rather, authority is granted for the use of the power of eminent domain if a proposed interstate coal transportation distribution system is found to be in the national interest. The sponsors may voluntarily seek such authority from the Secretary of Energy. Thus, only to the extent that the sponsors voluntarily place themselves under the provisions of S. 1844 would they be subject to any regulation.

Some additional paperwork will be required as a result of the bill, but only that as necessary to respond to applications pursuant to section 4, which are expected to be very limited in number.

No personal information would be collected in administering the program. Therefore there will be no impact on personal privacy from enactment of the bill.

X. Executive Communications

In addition to testimony received by the Committee on Energy and Natural Resources from the Administration on May 10 and June 8, 1982 (Committee publication No. 97–84), the Committee received the following communications from the Department of Commerce and the Department of Transportation:

Department of Commerce,
Washington, D.C., June 1, 1982.

Hon. James A. McClure,
Chairman, Committee on Energy and Natural Resources, U.S. Senate, Washington, D.C.

Dear Mr. Chairman: This is in response to your request for the views of the Department of Commerce on S. 1844, a bill "To facilitate the national distribution and utilization of coal."

S. 1844 would permit the exercise of the power of eminent domain over private lands by "any person proposing to build an interstate coal pipeline distribution system, the construction of which has been determined by the Secretary [of Energy] to be in the national interest. . . ."

The Reagan Administration fully supports the principle of free competition in the transportation of coal. Coal slurry pipelines may provide valuable competition in this important area. However, it is the view of the Administration that the use of Federal eminent domain is inappropriate where, as here, important rights of the states are at issue. The Department of Commerce therfore opposes S. 1844.

It is the view of this Department that market demand and proper economic conditions will ensure the construction of those coal pipelines which are cost-effective and will best serve the public interest.

We have been advised by the Office of Management and Budget that there is no objection to the submission of this letter to the Congress from the standpoint of the Administration's program.

Sincerely,

Irving P. Margulies,
(For Sherman E. Unger, General Counsel).

U.S. Department of Transportation,
Washington, D.C.

Hon. James A. McClure,
Chairman, Committee on Energy and Natural Resources, U.S. Senate, Washington, D.C.

Dear Mr. Chairman: This is in response to your request for the views of the Department of Transportation concerning S. 1844, a bill "To facilitate the national distribution and utilization of coal."

The purpose of the bill is to grant the Federal power of eminent domain to those interstate coal pipeline distribution systems that are determined to be in the national interest by the Secretary of Energy or his successor.

The Administration supports competition in the fields of energy development and transportation. Coal slurry pipelines should be allowed to compete on their own merits as contributors to improving America's energy situation.

However, we cannot support the extension of Federal powers of eminent domain to assure right-of-way acquisition for these pipelines. The Administration is committed to the transfer of decisionmaking from the Federal Government to the States. By the same token, eminent domain authority should remain at the State level except in instances of overriding national necessity. The present case is not considered to represent one of those instances.

The Office of Management and Budget has advised that, from the standpoint of the Administration's program, there is no objection to the submission of this report for the consideration of the Congress.

Sincerely,

JOHN M. FOWLER,
General Counsel.

XI. Additional Views of Senator Hatfield

The sponsors of S. 1844 and the Committee are to be congratulated for tackling a most controversial and complex issue; the distribution and utilization of domestic coal resources through slurry transportation. S. 1844 appropriately addresses many facets of federal eminent domain and state water law, and is worthy of continued debate on the Senate floor. However, the legislation may, over time, disserve state interests by leaving open to interpretation the applicability of state law to the acquisition of pipeline permits and rights-of-way.

I specifically refer to section 4(e) (Eminent Domain Authority) and section 7 (Application of State and Local Law) where language has been inserted to retain "state law, practice, or procedure *except where the effect of which would prohibit* any acquisition, location, construction operation or maintenance of the pipeline distribution system." (emphasis added) Clearly this language attempts to strike the necessary balance between state and national interests, however, the language provided herein is subject to multiple interpretations and may prove to be a difficult if not impossible legal finding. For example, is the language of section 4(e) and section 7 to be construed so narrowly that all existing state laws *shall apply* except for a blanket prohibition of slurry pipelines? Or is the language to be construed so loosely as to allow pipeline operators *to be waived* from state environmental laws if such requirements threaten the operation of the pipeline? It is my hope that states would be given maximum discretion in interpreting the applicability of their laws on pipeline operations within their boundaries. As presently drafted, however, the language is subject to multiple interpretations thereby leaving important state interests to be decided by future court litigation.

Until such time that states have had an opportunity to review and comment on such provisions as we presently contained in S. 1844, or the intent of the language is clarified, I reserve final judgment on enactment of this legislation.

Mark O. Hatfield.

XII. Minority Views of Senator Wallop

The record will show that I was among the six Senators voting "no" to report out of Committee the "Coal Distribution and Utilization Act of 1981." I intended to make it clear to all supporters of this legislation that my vote is a WARNING—a shot across the bow in effect—that unless my water amendments, unanimously adopted by the Committee, remain intact, I will lead the fight against the bill's passage.

For the first time in the eight years Congress has spent debating the issue of federal eminent domain for coal slurry pipelines, we are seriously talking about absolute protection of state water rights. Legislative proposals introduced in the last four Congresses have either never made it out their respective committees or have been soundly defeated on the floor; primarily, I venture, because none of them proposed to preserve, inviolate, the right of a state to manage and control its water without a hint of Federal infringement or involvement.

The water provisions originally proposed in S. 1844, which were identical to section 10 in the House companion bill H.R. 4030, are substantively similar to protective water language I proposed back on October 3, 1979, as an amendment to the "Priority Energy Project Act of 1979." The intent of this water language is clear. However, when placed on a complex legislative vehicle as the coal slurry bill, careful legislative drafting is critical. The importance of crafting a provision that leaves nothing to the imagination of any court in this land cannot be overemphasized.

On June 8, 1982, I chaired a hearing of this Committee on the water aspects of this bill. Based upon the testimony and recommendations of the three expert water witnesses, I proposed the amendments which the Committee adopted in the first mark-up of the bill. At that June 8 hearing, Dean Frank Trelease, formerly a water law professor and Dean of the University of Wyoming School of Law, *whom I consider to be the leading expert on water law*, summarized well the predicament we are faced with in the slurry bill. He explained, and I paraphrase:

Wyoming now prohibits the export of coal without the express approval of the legislature, and it has already given its approval to a couple of pipelines and a tentative approval to another. Montana has declared that the use of water for slurry to export coal from Montana is not a beneficial use, and South Dakota requires all large appropriations of water to be approved by the legislature and has created a special type of energy water right. The point is that these policies are now in danger.

Dean Trelease explained, "A little after the turn of the century in the case of *Hudson County Water* v. *McCarter*, Mr. Justice Holmes said that a state might keep to itself the natural advantages of its fresh water resources. But a few years ago, a three judge Federal Court held that the State of Texas could not constitutionally prohibit the

export of water to the city of Altus, Oklahoma, and that this would be an unreasonable burden on interstate commerce." *Altus* v. *Carr*. Dean Trelease predicted that, "my own opinion, my best guess, as to what the Supreme Court will do with the Sporhase case is that they will reverse it and reaffirm the *Altus* v. *Carr* case."

As we now know, Dean Trelease's prediction was right. The Supreme Court on July 2, 1982, decided the case of *Sporhase* v. *Nebraska* by reversing the Nebraska Supreme Court decision and finding that water is an article of commerce and that the operation of Nebraska's reciprocity statute was an unreasonable burden on interstate commerce.

To avoid the Sporhase result in relationship to coal slurry pipelines, Dean Trelease recommended legislative language that would clearly be an express grant of commerce clause power, showing an intent by Congress to recognize the primacy of state water laws and thereby eliminate the effect of the Altus case. The water amendments adopted by this Committee do that. They insure:

1. that the use and appropriation of water for all interstate coal slurry pipelines, not just those that use the right of federal eminent domain, be made pursuant to the law of the state where the diversion takes place;

2. that if a state denies a water permit or exercises conditions on such a permit or authorization, up to and including termination, that this exercise will not be prohibited as an unreasonable burden on interstate commerce;

3. that nothing in this law can be construed or inferred as granting the United States or its agents a new right to use water;

4. that federal reserved water can only be used in a coal slurry pipeline, if state law is fully complied with, and

5. that nothing in the law shall alter in any way any provision of state law or interstate compact.

Without these assurances, the whole coal slurry question becomes a catastrophe for the states.

MALCOLM WALLOP.

XIII. Minority Views of Senator Warner

America's coal industry has been buffeted by overregulation, infrastructure difficulties, inadequate ports and many other problems which have increased the cost of America's coal, making it difficult for coal to compete with other forms of energy at home and abroad. Whenever and wherever possible, this Senator has supported initiatives to increase American coal production and utilization, including measures to make coal more competitive in domestic and international energy markets. S. 1844 was touted as an initiative to make American coal more competitive, but the evidence is not convincing.

After reviewing all the testimony and arguments presented before the Committee on S. 1844, and after conducting my own independent examination with the various affected industries, local and State officials, and the general public, I have concluded that I cannot support S. 1844.

My objections to the legislation fall into four major categories. I am concerned that the legislation would drastically limit States' rights—one of the basic foundations of the Federal system of government established by the United States Constitution. A second category of concern is the availability of water and the technology to protect the quality of the water. Third, is the potential impact of pipeline on freight rates for coal and other commodities which will continue to be carried by rail. And finally, there is some evidence that pipelines will benefit large coal producers to the detriment of small producers—the backbone of the industry.

FEDERAL PREEMPTION

Federal preemptory powers are found in two major sections of S. 1844: Section 4—"Eminent Domain Authority", and Section 7—"Application of State and Local Law". These preemptory powers include the specific authority to condemn public and private lands through the granting of Federal eminent domain (Section 4), and, second, the general authority to strike down any and all State rules, regulations, and laws, the effect of which would be to prohibit the construction of coal slurry pipelines.

Eminent domain is traditionally an area of State—not Federal—control. In order to protect traditional states' rights, eminent domain should only be granted in extraordinary circumstances of national need. However, the testimony and evidence has not demonstrated such a need.

The President agrees with this conclusion. In his decision to oppose eminent domain legislation for coal slurry pipelines, the President states:

> * * * this Administration will not support legislation which has been introduced in the Congress to provide a federal right of eminent domain to override these difficulties. Our commitment to the vitality of State governments should not be abandoned simply because it may at times be inconvenient. The extension of federal powers of eminent domain should not be undertaken lightly.

If States determine that pipelines are in their best interests, they can facilitate their construction through state condemnation powers. In fact, at least 20 States now have statutes that permit a grant of eminent domain for coal slurry pipelines. A number of other States are considering coal slurry eminent domain legislation. Two pipelines have already been built without the benefit of Federal eminent domain, and rights-of-way for a third have been acquired. This is a far cry from the concept of State eminent domain obstructionism inferred in S. 1844.

Only one State—the Commonwealth of Virginia—has a specific statuate denying the use of State eminent domain powers for coal slurry pipelines.

The wisdom of keeping that statute on the books is being actively studied by private and public interests in Virginia. The Virginia Coal and Energy Commission, which is composed of State legislators, is examining the force and effect of the anti-slurry law. I am hopeful that the Commissions' report will be ready in time for the 1983 Session of the Virginia General Assembly.

Legislators, elected by the people of Virginia, will decide whether it is in the best interests of the people of Virginia to repeal this law. S. 1844 would take this decision out of the hands of the elected officials of the Commonwealth and place it in the hands of Federal bureaucrats.

In addition to Federal preemption of the States' rights of eminent domain, language included in S. 1844 threatens Federal preemption of other State laws, rules, and regulations.

In S. 1844, the theory of Federal preemption of State law (Section 7) is that State or local laws inhibiting the construction of coal slurry pipelines obstruct the flow of interstate commerce. S. 1844, as introduced, would have allowed the Federal preemption of any State or local law, rule, or regulation affecting an interstate coal slurry pipeline if that pipeline were deemed to be in the national interest.

This meant that S. 1844 would have granted pipeline companies the ability to strike down, carte blanche, an alarming number of State and local laws dealing with such issues as land use, zoning and siting, safety requirements, and construction and maintenance standards. Traditionally, these are issues addressed by State and local law.

I attempted to amend S. 1844 to insure that the laws, rules, and regulations passed by State legislatures would not be preempted by arbitrary enforcement of Federal legislation. Unfortunately, my amendment was defeated.

Instead, an amendment was adopted allowing State laws, rules, and regulations to apply, except where their "applicability *would have the effect of prohibiting*" a coal pipeline distribution system (emphasis added). I co-sponsored this amendment because it granted the States certain rights not otherwise specifically addressed in the bill. However, upon reflection, I am concerned that the ensuing debate on the amend-

ment left an ambiguous and subjective meaning to the clause, "have the effect of". This may be used by the courts in later interpretations of the bill to strike down State and local laws, rules or regulations rooted in the separation of Federal and State powers and based on perfectly sound legal foundations.

For example, a question was raised about whether the amendment could strike down State laws which address the rights of private parties to enter into private contracts for coal if the duration of these contracts set by law was too short to allow for construction of a coal slurry system. The answer was "yes". Thus, the right of parties to enter freely into private contracts could be limited by Section 7.

Consequently, I now question whether there is, in fact, any limitation to the Federal preemption powers contained in Section 7. Is any State or local law protected from the section's preemptory powers if there is a finding that such law has the effect of prohibiting a slurry pipeline? Reflective analysis leads me to a negative conclusion.

WATER

I am very concerned about the effect coal slurry pipelines may have on the quantity and quality of our Nation's water, and I have questions about the effect S. 1844 will have on States' ability to provide needed water to their citizens.

Water is a precious resource essential for human survival. Man uses water to quench his thirst and meet his daily personal needs. Recent studies indicate that over 80 percent of America's water supplies are used for agriculture.

Although proponents of S. 1844 assert there is enough water available to meet the needs of the public and the needs of the coal pipeline distribution systems, I am not convinced that is the case.

The problem of water scarcity is generally considered to be a western United States phenomenon. Two successive years of water shortages and the accompanying water restrictions in eastern Virginia have painfully driven home the fact that the eastern United States is no longer immune from this problem.

Coal slurry pipelines are a water intensive mode of transportation. Use of such significant amounts of water by slurry pipelines means that competing interests will not have the benefit of this water.

The Office of Technology Assessment's (OTA) March 1978 study, entitled "Coal Slurry Pipelines", clearly stated that slurry pipeline water use threatens agriculture and could foreclose future development of some regions.

OTA pointed out that in each of the pipeline origin areas studied, except one, the demand projected for water from 1985 to 2000 exceeded supply. OTA's assessment: ". . . a coal slurry pipeline could use surface water only at the expense of growth in the existing and new uses." The major competing uses would be agriculture and energy-related industry.

OTA continued this theme in its September 1980 summary:

> . . . Pipelines do compete directly with other possible *future* uses (of water). These include other alternative forms of energy development involving facilities *inter alia* for coal

> mining, electric power generation, and shale oil. Consequently, *a decision to construct a coal slurry pipeline will require consideration now of alternative uses for water in the future* (emphasis added). When levels of use exceed users' rights, as is the case during the years of relative abundance of water, new appropriations may displace present, as well as future, uses.

The displacement of present and/or future water uses is a cost to the public which has not been addressed. Though hidden, the cost will nevertheless be very painful.

An indication of the magnitude of these future displacement costs was outlined recently by University of Michigan Civil Engineering Professor Jonathan Bulkeley. Professor Bulkeley points out that even a relatively small diversion of water from the Great Lakes, say 10,000 cubic feet per sec., about the volume of water sought by the State of Montana from Lake Superior for a Montana slurry pipeline, would lower water levels enough through the interlocking system of the Great Lakes to cause the loss of $35 million in navigation revenue and $80 million in electrical generating ability.

Before the Senate considers S. 1844, it should seriously reflect on the potential displacement costs of coal slurry pipelines.

I am not convinced that existing coal slurry technology can assure adequate treatment of water discharged from coal slurry pipelines. Any slurry water ultimately discharged must be properly treated to prevent irreparable damage to groundwaters and surface waters. Also, construction of coal slurry "facilities" for storing flush water and the necessary slurry dump ponds may have major impact on water flows.

Finally, an issue of paramount importance is whether granting Federal eminent domain opens the door for Federal preemption of State powers over water allocation. What will prevent the eventual loss of control by the States over their own water? The 1978 OTA report concluded:

> Under the prior appropriation system for water allocation in many Western States, slurry pipelines, like any new applications of water, are accorded a lower priority relative to existing rights. They therefore may not be able to acquire water even if they were to represent a more economically productive use. The Federal Government has substantial power to control water resource allocation for pipelines, notwithstanding State provisions, if it should choose to exercise it. Even without an explicit choice to exercise that power, Federal certification of a pipeline project based on a finding that it served the public interest could supersede State water allocation authority under some circumstances.

The issue, simply put, is this: Can a State maintain control over the allocation of its own water so that it can retrieve, in times of water shortage, water it has dedicated to other endeavors such as slurry pipelines. The language in Section 6 and the Wallop Amendment represents a strong attempt to protect State water laws by indicating that the States retain control over the use of their water even though it is dedicated to slurry pipeline use. Clearly, there have been cases where

statutory language recognizing State water laws has been upheld by the courts (See, e.g., *California* v. *U.S.*, 438 U.S.C. 645 (1978)).

Nevertheless, while Section 6 as amended by Senator Wallop, attempts to define the types of State water laws which will be protected from Federal preemption, there can be no assurances that Federal courts will accept those definitions.

The Federal "Commerce Clause" power is historically so broad that it is questionable whether the goal of preserving State rights to control water use can be compatible with any legislation granting eminent domain authority to coal slurry pipelines.

On July 2, 1982, the United States Supreme Court issued a decision in one of the most important water law cases in many years, *Sporhase* v. *Nebraska* (50 U.S.L.W. 5115). *Sporhase* found that groundwater is an article of commerce and therefore subject to Congressional regulation. Because it was found to be an article of commerce, groundwater could not be subject to unreasonable burdens placed upon it by the States. The Supreme Court declared that a Nebraska statute that limited exports of water from the State, in an attempt to protect the State's water supplies from diversion, was an unconstitutional burden on the flow of interstate commerce.

However, supporters of S. 1844 and noted legal water law experts have indicated that Senator Wallop's amendment protecting State water rights vitiates *Sporhase* and insures that a State will retain ultimate control over its own water.

As a strong believer in the inviolate right of a State to regulate the allocation of its own water, I hope they are correct.

SMALL COAL PRODUCERS

In addition to the above problems, I do not believe the slurry pipeline would be to the overall competitive advantage of the U.S. coal industry. Even though western coal depends on larger mines, the backbone of the U.S. coal industry is still the small coal mine. For coal slurry technology to be cost effective, the slurried coal mixture must be constantly fed into the pipeline. This could limit pipeline services to larger mines with the capacity to supply large volumes of coal, to the detriment of smaller mines.

Many of the Virginia coal operators with whom I have talked oppose coal slurry pipelines for this reason. The views of some small miners are reflected in an editorial which appeared in the June issue of *The Coal Operator* published in Beckley, West Virginia:

> The ability of a small area of the coal industry to keep the pipelines filled at peak demand leaves no room for intermediate input of coal. *We do not believe, the coal slurry pipelines would be good for the entire coal industry. They would not help, but hurt, production in the bulk of mining areas in our country.*" (emphasis added)

FREIGHT RATES

Slurry pipelines are geared to high volume traffic. As the high volume coal traffic switches from railroads to pipelines, mines without access to pipelines could be forced to make up the railroads loss in

revenue by paying higher rates. This scenario was graphically illustrated by testimony of the American Association of Railroads (AAR) before the Subcommittee on Commerce, Transportation, and Tourism of the House Committee on Energy and Commerce:

> As railroad revenues decline with the loss of high volume coal traffic, the smaller remaining rail-using mines would either have to accept considerably higher rail freight rates, or shut down. This is because it is more expensive to serve small mines than large mines, and because as traffic is lost, fixed costs must be spread over the fewer remaining traffic units. Further new mines would not open unless they were large enough to attract pipelines."

Not only would some mines suffer because they could not avail themselves of lower transportation costs by using slurry pipelines; they would be forced to pay higher railroad freight rates for the movement of their coal.

Moreover, the AAR's testimony states that slurry pipelines would most likely adversely affect the freight rates of numerous other non-coal goods:

> Because high volume coal movements represent such an important part of railroad business, railroads which lost such traffic would be forced to try to make up their losses through increased rates on other traffic. A wide range of commodities could be affected—*with the higher delivered costs of these commodities offsetting any consumer savings from coal slurry pipelines.* (emphasis added)

For these reasons, I opposed S. 1844 in the Committee, and I look forward to a continued examination of these important issues.

JOHN W. WARNER.

XIV. Changes in Existing Law

In compliance with paragraph 12 of Rule XXVI of the Standing Rules of the Senate, the Committee notes that no changes in existing law are made by the bill (S. 1844) as reported.

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